SUPREME COURT, U. S.

APPENDIX

FILED
NOV 8 1967
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 410

GARY DUNCAN, APPELLANT,

vs.

STATE OF LOUISIANA, APPELLEE

APPEAL FROM THE SUPREME COURT OF LOUISIANA

FILED JULY 24, 1967

PROBABLE JURISDICTION NOTED OCTOBER 9, 1967

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 410

GARY DUNCAN, APPELLANT,

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APPEAL FROM THE SUPREME COURT OF LOUISIANA

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BILL OF INFORMATION—Filed December 5, 1966

No. 14643

Twenty-Fifth Judicial District Court

Parish of Plaquemines

The State of Louisiana

VS.

GARY DUNCAN

INFORMATION FOR

SIMPLE BATTERY

UNDER 1950 R.S. 14:35

LEANDER H. PEREZ, JR.
District Attorney Twenty-Fifth Judicial District

A TRUE COPY

Clerk of Court, Ex-Officio Recorder, Etc.

Plaquemines Parish

THE STATE OF LOUISIANA
Twenty-Fifth Judicial District S.S.

LEANDER H. PEREZ, JR., District Attorney for the Twenty-Fifth Judicial District, State of Louisiana, who in the name of and by the authority of said State, prosecutes in this behalf, in proper person, comes into the Twenty-Fifth Judicial District Court, in and for the Parish of Plaquemines, and gives the said Court here to understand, and be informed, that one GARY DUNCAN late of the Parish of Plaquemines, on the 18th day of October, 1966 with force and arms in the parish aforesaid, and within the Jurisdiction of the Twenty-Fifth District Court, for said Parish did commit a battery upon one Herman M. Landry, Jr., by striking him with his hand, without his consent, Contrary to the form of the Statute of the State of Louisiana, in such cases made and provided, and against the dignity and peace of the same.

/s/ Darryl W. Bubrig, Jr.
Assistant District Attorney,
Twenty-Fifth Judicial
District Court.

Filed DEC 5 1966

E. D. Rhoades Jr. Clerk

Arraigned DEC 7 1966

Plea NOT GUILTY

Arrgn. Contd. to

Fixed for Trial 12/21/66

12/19/66

Trial Contd. to 1/25/67

Verdict GUILTY

1/67 Sentence Deferred to 2/1/67

2/1/67 Sentence $150.00 & costs and Sixty days in Parish Prison; additional twenty days in event fine & costs are not paid.

B. W. Issued

Amt. of Bond

Bondsman

Atty. for Def. Robert F. Collins
Miles R. Douglas
Reuben A. Lee

STATE OF LOUISIANA
TWENTY-FIFTH JUDICIAL DISTRICT COURT

[Title omitted]

DEMAND FOR TRIAL BY JURY—
JANUARY 25, 1967

Gary Duncan, made defendant herein, hereby demands trial of this cause by jury. Defendant is charged with simple battery under L.S.A.-R.S. 14:35. The maximum sentence that may be imposed upon conviction of this charge is two years imprisonment. While there is no express provision of Louisiana law for a jury trial on a charge of simple battery, the right to trial by jury where the sentence may be in excess of six months is secured by the Sixth and Fourteenth Amendments to the United States Constitution, as construed by the United States Supreme Court in *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966).

Respectfully submitted,

ROBERT F. COLLINS
NILS R. DOUGLAS
RICHARD B. SOBOL
2211 Dryades Street
New Orleans, Louisiana 70113
By Robert F. Collins
Attorneys for Defendant

Dated: January 25, 1967

Duly sworn to by Robert F. Collins and Nils R. Douglas, jurat omitted in printing.

STATE OF LOUISIANA
TWENTY-FIFTH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES

[Caption omitted]

BILL OF EXCEPTION NO. I—Filed February 1, 1967

Be it remembered that before the trial of the above numbered and entitled cause, the defendant, by his counsel, did file a "Demand for Trial by Jury", as follows:

[Caption omitted]

Gary Duncan, made defendant herein, hereby demands trial of this cause by jury. Defendant is charged with simple battery under L.S.A.-R.S. 14: 35. The maximum sentence that may be imposed upon conviction of this charge is two years imprisonment. While there is no express provision of Louisiana law for a jury trial on a charge of simple battery, the right to trial by jury where the sentence may be in excess of six months is secured by the Sixth and Fourteenth Amendments to the United States Constitution, as construed by the United States Supreme Court in *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966).

Respectfully submitted,

ROBERT F. COLLINS
NILS R. DOUGLAS
RICHARD B. SOBOL
2211 Dryades Street
New Orleans, Louisiana 70113

By Richard B. Sobol

Attorneys for Defendant

Dated: January 25, 1967

Date Filed: February 1, 1967
C. R. Fouteuller, Deputy Clerk

The Court denied said motion and the defendant by his counsel did then and there in open court reserve the bill of exception making part thereof the demand for a jury trial, the arguments of counsel, and the ruling of the Court.

There being error to the prejudice of the defendant, the defendant files this formal bill of exception and tenders the same to the Court for signing pursuant to statute, which is done accordingly this 1st day of February, 1967.

EUGENE E. LEON,
JUDGE

STATE OF LOUISIANA
TWENTY-FIFTH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES

[Caption omitted]

NOTICE OF INTENTION TO APPLY
FOR A WRIT OF CERTIORARI–
Filed February 1, 1967

Defendant hereby gives notice, pursuant to Rule 12, Section 2 of the Rules of the Supreme Court of Louisiana, of his intention to apply to that Court for a writ of certiorari to review the judgment of this Court in the above captioned matter. Defendant moves that this Court set the return date for the application on February 13, 1967, and that the appearance bond in this cause be continued as bond pending the decision of the Supreme Court on the application. Alterna-

tively, defendant moves that other bond be established pending the filing of the application.

Respectfully submitted,

ROBERT F. COLLINS
NILS R. DOUGLAS
RICHARD B. SOBOL
2211 Dryades Street
New Orleans, Louisiana 70113
By Robert F. Collins
Attorneys for Defendant

Dated: February 1, 1967

STATE OF LOUISIANA
TWENTY-FIFTH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES

[Caption omitted]

ORDER—Filed February 1, 1967

The return date to file an application for a writ of certiorari in the Supreme Court of Louisiana is set on February 13, 1967. The appearance bond is cancelled and the new bond shall be fixed at $1500.00 pending the decision of the Supreme Court on the application.

EUGENE E. LEON

Dated: February 1, 1967
Pointe-a-la-Hache, Louisiana

EXTRACT FROM MINUTES OF COURT–
WEDNESDAY, FEBRUARY 1st, 1967

PURSUANT TO ADJOURNMENT THE COURT MET:
PRESENT: HON. EUGENE E. LEON, JR., JUDGE, DIV. "B".
HON. LEANDER H. PEREZ, JR., DISTRICT ATTORNEY
HON. DARRYL W. BUBRIG, SR., ASSISTANT
DISTRICT ATTORNEY

No. 14643

STATE OF LOUISIANA VS. GARY DUNCAN

Simple Battery

This matter was called.

Present: Leander H. Perez, Jr., District Attorney
Darryl W. Bubrig, Sr., Assistant District Attorney
Richard B. Sobol, Attorney for Defendant
Gary Duncan, Defendant.

Mrs. Del Norte M. Lancaster was duly sworn as the Official Court Reporter.

Defense Counsel announced to the Court that the accused was ready for sentencing, however, before sentencing, he would request a suspended sentence and presented statement in support thereof.

The Court answered counsel and then sentenced the said Gary Duncan to pay a fine of $150.00 and costs and serve Sixty days in Parish Prison; additional twenty days in the event fine and costs are not paid.

Defense Counsel presented to the Court his Bill of Exception No. 1 to the Court's previous ruling on the demand for trial by jury. Defense Counsel further presented to the Court his Notice of Intention to Apply for a Writ of Certiorari and the Court signed the Order fixing the return day in the Supreme Court of Louisiana for February 13, 1967. The Court then ordered the appearance bond cancelled and the

new bond fixed in the sum of $1500.00 pending the decision of the Supreme Court of Louisiana on the application.

Prisoner remanded.

AND THE COURT WAS ORDERED ADJOURNED:

SUPREME COURT OF LOUISIANA

Docket No. 48,573

STATE OF LOUISIANA

v.

GARY DUNCAN,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE TWENTY-FIFTH JUDICIAL DISTRICT COURT

[Index omitted]

Statement of the Case

Petitioner seeks review of his conviction of Simple Battery (L.S.A.-R.S. 14:35) in the Twenty-Fifth Judicial District Court.

On the afternoon of October 18, 1966, petitioner, a nineteen year old Negro, was driving south on Highway 23 in Plaquemines Parish. Near Boothville-Venice High School he saw his two young cousins along the shoulder of the road confronted by four white boys. The Negro youths had transferred earlier in the month to the formerly all-white Boothville-Venice school, pursuant to an order of the United States District Court for the Eastern District of Louisiana. The Negro boys had been the victims of threats and violence during their enrollment at the school.

Petitioner stopped his car to see what was happening. After exchanging a few words with the Negro and the white boys, he told his cousins to get into his car. Herman Landry, Jr., one of the white boys present, muttered to the petitioner, "You must think you're tough." It is at this point that the battery against Landry is alleged to have been committed. At trial three of the white boys and a white man who had been standing 250 feet away at the time of the incident testified that petitioner slapped Landry on the arm. Petitioner and his cousins testified that petitioner had lightly nudged Landry on the elbow and told him to go on home.

The Court resolved the conflicting testimony in favor of the State and found that petitioner had struck Landry with "force or violence" within the meaning of L.S.A.-R.S. 14: 33. On February 1, 1967, the Court signed petitioner's one bill of exception and sentenced him to 60 days imprisonment and $150 fine.

Although petitioner had demanded trial by jury, trial was to the court.

Grounds on Which the Supervisory Jurisdiction of This Court Is Invoked

Immediately after sentence on February 1, 1967, petitioner filed a Notice of Intention to Apply for a Writ of Certiorari, pursuant to Rule 12, Section 2 of the Rules of the Supreme Court of Louisiana. The jurisdiction of this Court is invoked under Article 7, Section 2 of the Constitution of the State of Louisiana. The District Court set bond at $1500 and set February 13, 1967 as the return date for filing this petition.

Issues and Questions of Law Involved

1. Does the denial of a jury trial for a crime punishable by two years in prison contravene petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States?

2. In the particular circumstances of this case, does the denial of a jury trial contravene petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States?

Assignment of Error

The trial Court erred in denying petitioner's demand for a trial by jury. (Bill of Exception No. 1).

Argument on Assignment of Error

Petitioner Was Deprived of a Trial by Jury in Violation of the Sixth and Fourteenth Amendments to the United States Constitution

At the commencement of the trial, petitioner demanded trial by jury. The Court refused the demand on the ground that Louisiana law specifically denies the right to jury trial to a person accused of a misdemeanor (Article 779 of the Code of Criminal Procedure). Misdemeanor is defined in Article 933 as any offense other than one punishable by death or imprisonment at hard labor. An examination of the particular circumstances out of which the arrest of petitioner arose, and the subsequent circumstances at trial makes clear the denial of a trial by jury composed of a fair representation of the community violated petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

In the summer of 1966, Plaquemines Parish was ordered by the Federal Court to desegregate its public school system. Pursuant to this order, petitioner's two cousins transferred to the formerly all-white Boothville-Venice school. During the early days of the fall semester, white students who remained in the school challenged, abused, and intimidated these and other Negro students.

On October 18, 1966—in the heat of this racially tense climate—petitioner's cousins missed the schoolbus and were walking home along Highway 23. Four white boys from

the school saw them, crossed the road to confront them, and exchanged threatening words with them. At this point, petitioner drove by and stopped his car. After speaking to his cousins and to the white boys, petitioner thought it best that he drive the Negro boys home. The Court found that after petitioner's cousins got into his car, petitioner committed a simple battery against Herman Landry, Jr., one of the white boys. As stated above, the Negro boys testified at the trial that the touching by petitioner was a light nudge and not with "force or violence" as required in L.S.A.-R.S. 14:33.

It is manifest that the circumstances attendant to the arrest of petitioner on the charge of battery were racially oriented. These same racial overtones were expressed at the trial; petitioner presented only Negro witnesses in aid of his defense while the prosecution's witnesses were all white.

Certainly, in this atmosphere, only a jury composed of a fair representation of the community could impartially assess the evidence and render a just verdict.

Under Louisiana law simple battery is punishable by two years imprisonment, L.S.A.-R.S. 14:33. The Sixth and Fourteenth Amendments to the United States Constitution guarantee trial by jury on this charge. In *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), the United States Supreme Court held that the Sixth Amendment bars a federal court from imposing a sentence in a contempt proceeding in excess of six months without affording the accused a trial by jury. Since contempt proceedings have historically involved lesser procedural safeguards to the accused than other criminal proceedings, it is manifest that at least the rule articulated in *Cheff* applies in non-contempt criminal proceedings.

The guarantees of the Sixth Amendment to the United States Constitution apply to the States by virtue of the due process clause of the Fourteenth Amendment. See *Gideon* v. *Wainwright*, 372 U.S. 353 (1963) (right to counsel); *Pointer* v. *Texas*, 380 U.S. 400 (1965) (right to confrontation of witnesses). Article 779 of the Louisiana Code of

Criminal Procedure is therefore unconstitutional on its face, insofar as it denied petitioner the right to a jury trial in this case.

Because he was deprived of trial by jury, petitioner was convicted in violation of due process of law secured by the Fourteenth Amendment.

Conclusion

The question presented in this case is one of first impression and is obviously of major importance. Louisiana law denies the right to trial by jury in many cases where a jury is available in most every other state. In these circumstances, it is appropriate that this Court consider the constitutionality of Article 779 of the Code of Criminal Procedure prior to federal review of the question.

Petitioner respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the Twenty-Fifth Judicial District Court.

ROBERT F. COLLINS
NILS R. DOUGLAS
2211 Dryades Street
New Orleans, Louisiana

RICHARD B. SOBOL
2209 Dryades Street
New Orleans, Louisiana

Of Counsel:

ALVIN J. BRONSTEIN
603 North Farish Street
Jackson, Mississippi

Dated: February 6, 1967

Certificate of Service (omitted in printing).

Duly sworn to by Robert F. Collins, jurat omitted in printing.

SUPREME COURT OF LOUISIANA

No. 48,573 February 20, 1967

State of Louisiana

v.

Gary Duncan

In re: Gary Duncan applying for writ of certiorari

The application is denied. No error of law in the ruling complained of.

/s/ JBF
/s/ JBH
/s/ FWH
/s/ EHMcC
/s/ WBH
/s/ JWS

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
February 20, 1967

/s/ Harold A. Moise, Jr.
Deputy Clerk

STATE OF LOUISIANA
TWENTY-FIFTH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES

[Caption omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Pursuant to Rules 10 and 11 of the Supreme Court of the United States, notice is hereby given that Gary Duncan, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Louisiana denying appellant's application for a writ of certiorari, entered in this action on February 20, 1967.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Appellant was convicted of the crime of simple battery, in violation of (L.S.A.-R.S. 14:35); was sentenced to sixty days confinement and a fine of $150, with twenty additional days confinement in the event fine and costs are not paid; and is presently enlarged on bond in the sum of $1,500.

II. Pursuant to Rule 12(2) of the Supreme Court of the United States, the clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The Bill of Information, filed December 5, 1967, including the notations of the plea, the verdict and the sentence;

2. Appellant's "Demand for Trial by Jury," filed January 25, 1967;

3. Appellant's "Bill of Exception No. I," filed and signed by Hon. Eugene E. Leon on February 1, 1967;

4. Appellant's "Notice of Intention to Apply for a Writ of Certiorari," filed February 1, 1967;

5. Extract from the Minutes of Court, Wednesday, February 1, 1967, pertaining to this cause;

6. Appellant's "Petition for a Writ of Certiorari to the Twenty-Fifth Judicial District Court," filed in the Supreme Court of Louisiana on February 6, 1967;

7. The Order of the Supreme Court of Louisiana denying a writ of certiorari, filed on February 20, 1967;

8. This "Notice of Appeal to the Supreme Court of the United States," dated May 12, 1967.

III. The following question is presented by this appeal:

Do the Sixth and Fourteenth Amendments to the United States Constitution secure the right to a trial by jury in a state criminal prosecution for "simple battery," where a two year prison term may be imposed?

RICHARD B. SOBOL
2209 Dryades Street
New Orleans, Louisiana

DONALD JUNEAU
2209 Dryades Street
New Orleans, Louisiana

Attorneys for Gary Duncan,
Appellant

Dated: May 12, 1967

Certificate of Service (omitted in printing).

SUPREME COURT OF LOUISIANA

[Caption omitted]

ORDER

Upon consideration of appellant's Motion for Enlargement of Time in Which to Docket Appeal in the Supreme Court of the United States,

IT IS ORDERED that appellant's time to docket this case in the Supreme Court of the United States be, and it hereby is, enlarged to and including July 24, 1967.

/s/ Joe W. Sanders
Associate Justice

Dated: July , 1967

COUNSEL'S NOTE

Uncertified Transcript of Testimony and Notes of Evidence before 25th Judicial District Court, Parish of Plaquemines, State of Louisiana was not before the Supreme Court of the State of Louisiana.

25th JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

STATE OF LOUISIANA — NO. 14643

vs. — SIMPLE BATTERY

GARY DUNCAN

TESTIMONY AND NOTES OF EVIDENCE
TAKEN BEFORE THE HONORABLE
EUGENE E. LEON, JUDGE PRESIDING
ON WEDNESDAY, JANUARY 25, 1967.

APPEARANCES:

LEANDER H. PEREZ, JR., ESQ.
DISTRICT ATTORNEY

DARRYL W. BUBRIG, SR., ESQ.
ASSISTANT DISTRICT ATTORNEY

ATTORNEYS FOR STATE
OF LOUISIANA

RICHARD B. SOBOL, ESQ.
ATTORNEY FOR DEFENDANT

REPORTED BY:

RONALD B. HOTZ,
OFFICIAL COURT REPORTER

MR. SOBOL: Your Honor, may it please the Court, I'd like at this time to pass up to you a demand for trial by Jury in this case. (Hands document to counsel)

MR. SOBOL: If I may speak on the motion, Your Honor, there is no authorization for a Jury trial in a non-felony case under Louisiana law. It's the defendant's contention that under the United States Supreme Court ruling in State versus Schackenberg, that where the potentiality of the sentence is in excess of six months, there is a right to trial by Jury. It's on this basis, not on the authorization of the State of Louisiana law to be found, that we make a request for trial by Jury.

MR. BUBRIG: Your Honor, the State will certainly oppose a trial by Jury. This is a misdemeanor. The law is very clear. The Louisiana law is very clear that the defendant does not have a right to trial by Jury unless the case is a felony, and I think that the defendant cannot be denied any [3] rights by a trial by Judge.

THE COURT: The Court is very familiar with this statute fixing the juries. Misdemeanors are not tried by Jury with or without hard labor. It's a five-man jury with hard labor or a twelve-man jury and nine men concurring; capital must be a twelve-man jury, twelve men concurring. These are the requirements under the Louisiana law. The Court is going to deny your request.

MR. SOBOL: The defendants would like to reserve a bill of exceptions from the Court's ruling on this motion, making part thereof a written demand, counsel's comments, and the ruling of the Court.

The defendant is ready for trial, Your Honor. We'd like to make a motion for a sequestration of all witnesses.

MR. BUBRIG: The State will prove with the testimony of Wayne M. Sarman (spelled phonetically) and others, that on the 18th day of October, 1966, Gary Duncan, at about 4:30 P.M., did strike Herman M. Landry, Jr., [4] with his hand, without his consent – the consent of Herman M. Landry, Jr.; that the striking was within the Parish of Plaquemines, and in particular, Boothville, Louisiana.

The State would like to call for its first witness.

THE COURT: Wait just a second. Do you have an opening statement to make, Mr. Collins?

MR. SOBOL: Mr. Sobol.

THE COURT: Mr. Sobol, I'm sorry.

MR. SOBOL: No. We'll waive the opening statement at this time. We'll open prior to the defense's case, if that will be all right.

THE COURT: The procedure is that the opening statements are made upon the onset of the trial, any statement you wish to make. If the defendant waives it, his opening statement which he has a right to do – the District Attorney has no right to waive the opening statement. If the defendant [5] waives his right, then he can cover it in his closing statement.

MR. SOBOL: We do so waive, it Your Honor.

MR. BUBRIG: The State will call for its first witness, Wayne M. Sarman.

THE COURT: Let me ask you something: You had requested a sequestration of all witnesses. Did you call the list of witnesses?

THE CLERK: Yes, sir. I called them and they're outside, except Deputy Smith.

THE COURT: Deputy Smith, will you step outside. You are a witness in this case. (All witnesses sequestered)

WAYNE MICHAEL SARABIN
P. O. BOX 175
VENICE, LOUISIANA

after having been first duly sworn by the Clerk of Court, did testify as follows:

DIRECT EXAMINATION

BY MR. BUBRIG:

[6] Q. What's your full name? A. Wayne Michael Sarabin.

Q. How old are you? A. Fourteen.

Q. What is your birth date? A. May 26th, 1952.

THE COURT: Mr. Collins, do you have any witnesses. I don't know whether you subpoenaed any.

MR. SOBOL: All witnesses are included, Your Honor.

THE COURT: I saw other people sitting in the Courtroom.

MR. SOBOL: They're not our witnesses.

THE COURT: It's Mr. Sobol. I'm sorry.

BY MR. BUBRIG:

Q. Wayne, do you recall an incident that occurred on October 21st? A. Most of it; not all of it.

Q. Could you tell us what you remember? A. Well, we was talking to the boys from what I remember of it, we were talking to the two colored boys on the side of the road. And Gary Duncan and this other boy passing in the car, [7] they stopped and backed up to us. They asked us what we was doing. We told them we was talking to the two boys, and asked them their name and all. And the two boys said we was lying. So, Gary Duncan, he asked us if we wanted to know his name, and Herman Landry told me, "Yes." And he had his name on his shirt. And he says, "Can you read?" Herman told him, "Yes." And he said, "You still want to know my name?" Herman said, "Yes." He told Herman he was a smart little punk.

Q. Those are the words he used? A. Yes, sir.

Q. Go on. A. Well, then, Herman turned to me and he told me he must have thought he was smart, and asked Herman what he said. And he slapped him.

Q. Who slapped him? A. Gary Duncan slapped Herman.

Q. Where did he hit him? A. On the arm.

Q. Was it a hard slap? A. Pretty hard, yes.

Q. Were there any other words exchanged? A. That I can recall, no.

[8] Q. Where was this? A. Well, right across the street from the speedway one store, right in front of the little fish barroom.

Q. What were you doing at the scene? A. What do you mean?

Q. Why were you there? A. Well, we was – we was all – our intention was to go over to the store. We used to go there – over there every evening and get a soft drink after school. We was walking over there and these two boys was walking. So, we went to talk to them.

Q. What time was this? A. Right after school let out.

Q. What time does school let out? A. School lets out at 2:30.

Q. What was the discussion between you and the two colored boys about? A. Well, we was talking to them. They had an incident at school. They had a little trouble, and we was asking them about it.

Q. Did Herman Landry ever strike Gary Duncan? A. No, sir.

Q. Did he ever threaten him? A. Well, after Gary Duncan slapped him, he said he [9] was going to call the police on him.

Q. But, only after he was slapped? A. Yes, sir.

Q. You mentioned the name Gary Duncan. Who is Gary Duncan? Would you recognize him? A. Yes, sir.

Q. Is he in the Courtroom? A. Yes, sir.

Q. Where is he? A. Right sitting – right over there. (Indicating)

Q. You're certain? A. Yes, sir.

MR. BUBRIG: I have no further questions.

CROSS EXAMINATION

BY MR. SOBOL:

Q. Wayne, all the questions you just answered were in response to a question about October 21st. Do you have any particular recollection that it was the 21st of October rather than some other day? A. No.

Q. In other words, there was only one incident that you know of that you were involved in of this kind; there was not two, is that correct? You only know of one incident? [10] A. I was only involved in one.

Q. In one? A. (Nods head affirmatively)

Q. And you have no particular – nothing that holds the 21st of October distinct from the 18th, is that correct? A. No, sir.

Q. Now, Wayne, you're fourteen years old. Are you in school? A. Yes, sir.

Q. What school do you go to? A. Boothville-Venice High.

Q. Boothville-Venice High. What grade are you in? A. Ninth Grade.

Q. Who were the two boys you were talking to on the road, before Gary Duncan drove up; do you know who they are? A. I know them by their first names, yes, sir.

Q. What are their first names? A. Well, Bert and I can't recall the other one's name. I can't seem to recall his name right now.

Q. If I told you the name of the two boys were Albert Grant and Bernard St. Ann – A. Yes, Bernard.

Q. Bernard St. Ann. Does that sound right, does it? That sounds like those two boys? [11] A. I don't know their last names.

Q. Bert and Bernard? A. (Nods head affirmatively)

Q. Were these boys in the same school as you? A. Yes, sir.

Q. I'm sorry, what grade did you say you were in? A. Ninth.

Q. And were either of these boys in the ninth grade? A. No, sir.

Q. As far as you know – but, they're in the school the same school you go to? A. Yes, sir.

Q. And they had just entered that school the preceding month, is that correct? A. Well, I don't know when they entered. I had just started this year.

Q. You took some note of the fact that they were there, didn't you? A. Yes, sir.

Q. You did. Had you spoken to either of these two boys prior to the time you spoke to them on the road? A. No, not that I can remember.

Q. You had never spoken to them at all anywhere in the school? A. I don't know. I might have, but I don't remember.

[12] Q. How about in the boys's bathroom, in the school, had you ever seen them there? A. I seen them in there, yes.

Q. Did you speak to them in there? A. No.

Q. Were you in a group that spoke to them there? A. No, sir.

Q. You mean you had seen them when you and one of them were in the boys' bathroom, that's all. You were not in the group that – A. Yes, sir.

MR. BUBRIG: Your Honor, I object.

MR. SOBOL: To what?

MR. BUBRIG: The line of questoning. First I think it's irrelevant to the battery committed by Gary Duncan.

MR. SOBOL: I want to show the background. Actually I want to show the Court what happened to –

MR. BUBRIG: Well, Your Honor, it's not relevant as far as this particular crime is concerned.

[13] THE COURT: This man – this young man, I should say, a young man is under cross examination, Mr. Bubrig. Proceed.

BY MR. SOBOL:

Q. The answer to the question is you had not been in a group which threatened these two boys in the boys' bathroom at Boothville-Venice High School that same day or October 18th, is that your testimony? A. No, sir.

Q. You were not in that group? A. No, sir.

Q. At the time you saw them in the boys' bathroom, was a different day or the same day? A. Well, I don't remember, really recall if I seen them.

Q. Had you been aware that these boys had been threatened, physically threatened at the school the same day? A. I heard about it after it happened.

Q. You heard about it? A. (Nods head affirmatively)

Q. Now, this incident we're talking about today, happened after school, is that correct? A. Yes, sir.

Q. And you had left school, and these boys had left [14] school, and you were at a store on Highway 23, is that correct? A. Yes, sir.

Q. And were you on the west side or the east side of the road prior to the time that you saw these two boys? A. Well, we first saw them – we left the school together. They was on the east side of the road and we was on the west side.

Q. West side. And this incident where Gary Duncan allegedly hit Herman Landry, that was on the east side as well? A. Yes, sir.

Q. So, you and the group you were with crossed the road and came over to the east side? A. Yes, sir.

Q. Now, what was your purpose in crossing the road to go to the east side? A. Talk to the boys.

Q. What was your purpose in talking to the boys? A. Find out their names and one wanted to find out about something that had happened in school that day.

Q. What did you want to find out about? A. Well, they had a fight. A boy had a fight with one of them or a friend of their's, and we [15] wanted to find out about it.

Q. Now, would you categorize the conversation you attempted to have with these boys as a friendly conversation or not? A. Yes, sir.

Q. It was a friendly conversation? A. Yes, sir.

Q. It was just conversation between boys going to high school together, no threats and no making fun of them, just a kind of a conversation that you three boys, you three white boys would have with each other, is that correct? A. Yes, sir, after we crossed the road.

Q. After you crossed the road. Now, why did you say, "When you crossed the road —" Who did the talking when you crossed the road? A. Well, all of us was talking to them.

Q. And all of you at first were saying, "What's your name," is that correct? A. Yes, sir.

Q. But, you in fact knew their names, didn't you? A. Well, I never at the time, no.

Q. You didn't at the time — what did they say when you asked them their names? A. Well, I — they told us their names.

[16] Q. He told you their names or they said, "I will not tell you my name?" A. They told us their name.

Q. I see. And what happened next? A. Well, about that time Gary Duncan drove up.

Q. You mean that's all it was to it; you came across the road – how many was in this group with you that crossed the road? A. Four.

Q. A total of four boys and you crossed the road, and these fellows stopped and Bernard stopped, and you said, what's their name, and they told you their name, their full name – or did they just tell you their first name? A. Well, no. We had said a little more than that. We was talking about what happened in school that day.

Q. About this fight that happened? A. Yes, sir.

Q. And just at that point the defendant drove up, is that right; A. Yes, sir.

Q. Now, what – where was his car going; was he heading south? A. He was heading down.

[17] Q. He was heading south? A. Yes, sir.

Q. He saw the group and he stopped? A. Yes, sir.

Q. What did he do then? A. He asked what we was doing.

Q. He got out first? A. Yes.

Q. Was there someone else riding in the car with him? A. Yes, sir.

Q. Did he get out? A. No, sir.

Q. He stayed in the car. Now, what did you say to Duncan; what were you doing; who answered him when he asked that question? A. Herman.

Q. Herman answered him. Did anybody speak to him other than Herman? A. Sir?

Q. Did anybody speak to Duncan other than Herman Landry, of the group of four boys? A. No, sir.

Q. The conversation was one between Duncan and Landry? A. Yes, sir.

Q. And as I recall your testimony, when Duncan got out, he asked what was happening, and Landry's [18] answer was just – "We were just trying to find out their names," is that correct, is that what you said? A. Yes,

Q. But, you had found out their names by that point, hadn't you? A. Yes, sir.

Q. Well, why did he say he was trying to find out their names after he had found out their names; do you have any idea? A. Well, we found the names. We were getting ready to go.

Q. You were getting ready to go at that point, before Duncan showed up; A. Yes, sir.

Q. And then this conversation ensued between Duncan and Landry, when Duncan said, "You want to find out my name," and his name was on his shirt, is that correct? A. Yes, sir.

Q. And Landry said he – Duncan said, "Can you read?" Am I repeating your testimony correctly? A. Yes, sir.

Q. And what did Duncan say, "You're a smart punk?" A. Yes, sir.

Q. And at that point he hit him? [19] A. Well, Herman turned to me, and he said, "He must think he's smart, huh?" And he asked Herman what he said. And he slapped him.

Q. Oh, Herman turned to you. Now, who called who a punk? A. Gary Duncan called Herman a punk.

Q. In other words, Herman turned to you and said – he said he must think he's smart? A. Yes.

Q. I see. I didn't understand that. Then, Duncan hit Landry. Now, I wonder if, with the Court's permission you would show me the way in which he hit Landry, if you'd get up and show me. Now, I'll be Herman Landry, and you be the defendant. And you show me how that happened? A. Well, I don't remember. I don't really remember if it was the back of his hand or the front of his hand. But, he came across and hit him on the arm, like he come across – I don't remember. (Indicating)

Q. Just once, about here? (Indicating) A. Yes, sir.

Q. And at that point what happened? A. Well, Bud Lathorne (spelled phonetically) he was standing across the street at the site of the [20] private school down there. And he hollered and said if they didn't leave us alone or something, that he would call the cops.

Q. If who didn't leave you alone? A. I guess he was hollering at Gary Duncan, I guess.

I didn't understand him at first.

Q. I see. And what happened then? A. Well, Herman told Gary Duncan if he slapped him one more time he was going to call the cops on him.

Q. I see. Herman said that and then what happened? A. Gary Duncan told the two boys to get in the car and then they left.

Q. I see. So, the hitting that you're talking about, was that one supposed slap on the elbow from Duncan to Landry, and that's all there was to it, as far as you saw, is that correct? A. Yes, yes, sir.

Q. Did you speak to Officer F. J. Smith, about this accident – incident that day? A. Yes, sir.

Q. And what did you tell him about it? A. Oh, I told him that Gary Duncan hit the boy there.

Q. You told him that he did hit the boy? A. I told him he did hit the boy.

Q. You are quite sure of that? [21] A. Yes, sir.

MR. SOBOL: I have no further questions.

REDIRECT EXAMINATION

BY MR. BUBRIG:

Q. Wayne, do you know why the defendant, Gary Duncan, stopped? A. Well, I guess he wanted to know what we was doing by the boys.

Q. Did he say why he stopped? A. No. He just come over there and asked us what we was doing.

Q. Do you know of any reason for him to stop? A. I guess he thought maybe we was trying to jump the boys or something.

MR. BUBRIG: I have no further questions.

RECROSS EXAMINATION

BY MR. SOBOL:

Q. What was it about your conduct, the conduct of the group you were in that would give Duncan the impression that you were trying to jump the boys? A. Well, there was

only two of them and four of us, and we was talking.

Q. And had you blocked their way on the road? [22] A. No, sir. Well, our group was standing there, and they was – they could have left any time.

Q. Could you categorize – would you say Bert and Bernard wanted to be standing there talking to you or were supposed to stand there talking to you? A. Well, they could have left if they wanted to.

Q. But, you were not standing in the way? They were headed south and didn't you cross the road and get in their way, and in the direction they were heading? A. We crossed the road, but we never got in their way.

Q. Didn't you come to the south side of them? A. Yes, sir.

Q. But, you say they could have walked around you if they wanted to? A. All they got to do is – was keep walking straight.

Q. They could have walked straight right into you? A. No. They wouldn't have to have run into us. They could have kept going if they wanted.

Q. I see. Where was this group of four standing; this group of four that you were in? A. What's that?

Q. Weren't they standing in front of Bert and Bernard on the south side? [23] A. No. We was standing – well, they were standing like this. They were standing right – they could have kept on going. We didn't stop them.

Q. So, the only thing that might have given Duncan the impression you were about to jump these boys was the numbers? A. Yes, sir.

Q. Four of you and two of them. Were Bert and Bernard friends of yours before this? Had you seen them at school – I mean this was not – A. Well, no. This is the first time I had talked to them.

Q. The first time you talked to them. A. Yes.

MR. SOBOL: That's all the questions I have.

MR. BUBRIG: I have no further questions.

THE COURT: Step down, son.

RANDOLPH SCARMAN
P. O. BOX 147
VENICE, LOUISIANA

after being first duly sworn by the Clerk of Court, did testify as follows:

MR. SOBOL: Your Honor, I wonder if the witnesses understand that they're not supposed to be talking to each other about the case? I'm referring to the witnesses in the Court.

MR. BUBRIG: We'll keep them separated.

THE COURT: Tell the boy that just testified to go sit in the Jury Room.

DIRECT EXAMINATION

BY MR. BUBRIG:

Q. Is it Randolph or Randy? A. Randolph.

Q. Randolph, how old are you, son? A. Fourteen.

Q. Do you recall an incident that occurred in Boothville? A. Yes, sir.

Q. Do you recall about which date that was? A. No, sir.

Q. Was it in the morning or afternoon? A. Afternoon.

[25] Q. Could you tell the Court what happened? A. Yes, sir.

Q. Go ahead. A. Well, it started upstairs. Well, I wasn't with the boys upstairs. And – well, every evening me and my cousin, we hitchhiked home. And we was walking down to the store with Herman. So, as we was walking and we was talking to Bert and Bernard, as we was walking, and Herman Smith spit over his shoulder like that. And so, we walked a little further down, and then Bert spit. And he spit on his shirt. And we start leaving. Well, I mean me and Herman – and so – we walked down a little further. And Herman or Wayne said something to him or something. And they was saying some words back to me. I don't remember. An when we got down to the store and was Bert, yes, I believe it was Bert, asked us if we wanted to fight them. And Herman said, says, "We'll fight if you want –

if you all want to fight." He says, "If you all want to fight, I'll go get some boys to fight." And Wayne told him his age, and he didn't believe Wayne. Wayne had is birth certificate with him. So, we went across the street and we was – well, [26] well, Herman – and then, Herman was talking about – about that fight they had upstairs that Tuddie and Bernard had. And Wayne was showing him his birth certificate out, and then Gary, Gary come down the road in his car. An he got a little ways by, and he backed up. He come out. Well, he backed up. And he got out the car. There was another guy sitting in the car with him. And so, he got out, and he asked Bert what was wrong. And Bert said, "These boys want to fight." And Herman said, "no, we're just over here asking them their name." And so, Gary asked Herman, he said, "Herman, you want to know my name?" Herman said, "Yes," he said, asked Herman, "can you read?" Herman said, "Yes." "You still –" He said, "You still want to know my name?" Herman says, "Yes." He said, "You smart, huh?" Herman said, says, "No." He told – he said, "Best for us not to get smart or he was going to whip all of us. So, he turned around. He told Bert and Bernard to get in his car. And he turned around. Herman told me that – Herman said, "He must think he's tough." And Gary happened to hear him. He said – Gary turned around and said, "What [27] did you say?" And Herman said, "You must think you're tough." And that's when he – well, he hit Herman on the arm. And right then Mr. Lathum hollered. Then Gary told him to get in his car. So, he got in his car and he took off down the road. So, we was walking over to the store, and Mr. Lathum told us to stay there. He said, "I'm going to call F. J." So, we called F. J. So, after a while F. J. come up there with Gary and asked some questions, and asked us our name and age and all. And then he took us up the road by Herman's mama, and then he pressed charges.

Q. You referred to one Bernard. Who is Bernard? A. He's one of the witnesses for Gary, I believe. I'm not sure.

Q. He had been in some difficulty earlier in the day, is that correct? A. Yes, sir.

Q. He had been involved in a fight? A. Yes.

Q. Where at? A. In Boothville School, upstairs.

Q. Were you a party to that fight? A. No, sir.

[28] Q. Was either Wayne or Herman a party to that fight? A. No, sir.

Q. You stated that the defendant struck Herman. How did he strike him? A. Well, he hit him with a back arm like that, hit him right here on the shoulder. (Indicating)

Q. What type of a hit would you say it was? A. Well, it was – well, he had his first bundled, but it was like a slap or a hit towards the arm or shoulder.

Q. Had he threatened you all? A. Yes, sir.

Q. What did he say when he threatened you? A. He said – well, he said, "You all getting smart." He said, "I'm going –" Well, he said, "I'm going to beat all of you all." Like that.

MR. BUBRIG: I have no further questions.

CROSS EXAMINATION

BY MR. SOBOL:

Q. Were you a witness to this fight in the school? A. No, sir.

Q. You just had heard about it? A. Yes, sir. Well, Herman and Wayne had told me about it.

[29] Q. Herman and Wayne had seen it? A. Yes, sir. They were upstairs.

Q. Wayne had seen it? A. Yes, sir.

Q. Wayne is your man that just testified? A. Yes, sir.

Q. He told you he had seen this fight. I see. Now, when you were walking down after school was out, you left the school and you went to Highway 23, is that correct? A. Yes, sir.

Q. And you saw Bert and Bernard? A. Yes, sir.

Q. Well, tell me about this spitting again. I didn't get that straight. How did that go? A. Well, we was walking, and then we was talking to ourselves, me and Wayne and Herman. And there was another boy, Westley. But, he moved. And we was talking to ourselves. And Herman

spit like that, and looked across the road. And Bert did the same thing, but spit on his shirt, on his shoulder.

Q. Bert spit on Herman's shirt? A. No, Bert spit on his own shirt.

Q. Spit on his. I see. A. And he hollered something, and we started laughing.

[30] Q. I see. Because he had spit on his shirt? A. Yes.

Q. But, these two groups were at least trying to spit at one another? A. No, sir, not at one another.

Q. Or just in the direction? A. No, sir. We was – well, the road runs like this. They was on this side and we was on this side, and Herman spit this way. And he spit towards the road. But, he spit on his shirt. (Indicating)

Q. At this point you're on different sides of the road while the spitting is going on? A. Yes, sir.

Q. Then what happened then? A. Well, we was walking a little further down the road.

Q. You're each on different sides, now, kind of parallel to each other, is that right? A. Yes, sir.

Q. I see. A. And then they was – said some words or something like that until we got to back and forth and looking at each other.

Q. What kind of words were these? Were these friendly words or were you making - [31] A. I couldn't remember the words, but I know they was – were saying something.

Q. What kind of things, do you remember? What were you talking about back and forth? A. Something about upstairs.

Q. About this fight? A. Yes, upstairs.

Q. What kind of things about the fight were you saying, do you know? A. I don't know.

Q. You don't remember anything about it? A. No.

Q. And then what happened? A. Then, when we got to – in front of the store, when we got in front of the

store and then – well, that's when Bert asked us if we wanted to fight.

Q. He called across the road to you, is that right? A. (Nods head affirmatively)

Q. When he said, "Do you want to fight?" Did Wayne hear that, do you suppose? A. Well, he was there. I don't know if he heard it. But, he was there.

Q. Bert shouted it out across the road so you could hear it very plainly? A. Yes, sir.

[32] Q. And did his making the remarks surpise you in light of what had just transpired between these two groups; was it the kind of a remark you might expect? A. Well, no, not to me.

Q. What are the words, "not to me," referring to, that you did not expect it? A. Well, we didn't want to fight them. But, if they would have wanted to fight we would have fought them like that.

Q. I see. You were willing to fight, but you didn't talk about a fight in advance of your shouting this. You didn't mention fight first other than the fight upstairs. It was Bert who said, "You want to fight?" A. Yes.

Q. And Bert is with one person and you're with three, and he challenges this group to a fight? A. That's right.

Q. (This question stricken from the record upon the orders of the Court.)

MR. BUBRIG: If Your Honor please, the State asks that that last remark – it's a self-serving declaration by the attorney, that it be stricken from the record.

[33] MR. SOBOL: I have no objection.

THE COURT: Let that last remark be stricken from the record.

There is no Jury, however, a record is being made.

BY MR. SOBOL:

Q. So, they challenged you. He said, "Do you want to fight?" And in response or somehow in response, you crossed the road. It was just then you crossed the road, you and your friends? A. Well, it wasn't exactly then.

Q. Well, what happened between these challenges to fight and the time you crossed the road? A. Well, that's when Herman told him if they wanted to fight, they'd fight. And he said, "If you all want to fight, I'll go home and get somebody, get somebody to help him," or something like that.

Q. Bert was going to get more men to equal the odds? A. Right.

Q. And then what happened?

MR. BUBRIG: [34] If Your Honor please, the State asks that counsel for the defendant control his remarks to the testimony of the witness, and not insert any information, Your Honor, into the record. This is a self-serving declaration.

MR. SOBOL: Your Honor, I was trying to get clear what he was –

MR. BUBRIG: No, you're trying to get into the record before the Court your own personal remarks.

MR. SOBOL: I am not.

THE COURT: You have done this on two or three occasions. The Court has caught testimony that you asked this question, and then he answered it, and you come back with another question stating what he answers. And you don't even state what he has answered. You're changing the declarations of this man completely. Whether you're trying to put something into the record, I have no idea. But, I wish you would confine your [35] questions of this gentleman to his answers, and not add your own words to his answer.

MR. SOBOL: Well, I was trying to get straight what the witness meant by, "Get some more people." But, if there's an exception to that remark –

MR. PEREZ: And further, if Your Honor please, the State has not objected to the lengthy questioning of certain witnesses, but the State will object at this time to any testimony with respect to the defendant – anything that these boys might have said, and the State will prove that the de-

fendant came upon this scene when there were five or six people, and that was when the crime was committed by the defendant, not by these boys. And anything that these boys might have said or done has nothing to do with the particular charge at all, and that is simple battery.

THE COURT: Let this objection be noted for the purpose of [36] the record.

The Court did not sustain Mr. Bubrig when he made this objection. As far as the Court is concerned, this crime being tried before me today, this is highly immaterial – I mean he stated he wants to show the events leading up to it. But, the events leading up to it have no bearing on the crime as far as I have seen.

MR. SOBOL: We haven't put our case on, yet, and I hope that the point – to show why they do have a connection with the actual crime.

THE COURT: For the purposes of the record, we'll let the objection Mr. Perez raised go into the record.

MR. SOBOL: That's an objection and not a motion, I understand.

BY MR. SOBOL:

Q. They said if they're going to fight, we want to get some more people, is that right? Is that the correct statement? Is that what you said? A. I did not understand what you said.

[37] Q. All right. Let's go back and make sure this is your testimony.

It's your testimony, is it not, that Landry said, "We don't want to fight, but if you want to fight we'll fight, is that correct?" A. That's right.

Q. All right. Now, who said, "What next?" A. Then – well, Bert thought that we was about, oh, I guess, sixteen or seventeen years of age. Well, before that he said that he would go ahead and get some help, because we was that age, you know. They – he thought we was older than him. And Wayne says, "I can prove that." And Wayne pulled out his birth certificate. And that's one reason why we started across the road, to show that Wayne was fourteen, and that was about it.

Q. He came across the road with his birth certificate? A. Yes, him and Herman started first. And me and the other boy was sort of behind him.

Q. I see. What happened when he got there? A. Well, we got across the street, and Wayne was showing them his birth certificate. And then Herman and them started talking about the fight upstairs. And then that's when Mr. Duncan come out.

[38] Q. What kind of conversation were they having about the fight upstairs? A. About Bernard had got knocked down.

MR. PEREZ: If Your Honor please, the State will –

THE COURT: I see no relevancy of this line of questioning, Mr. Sobol.

MR. SOBOL: Well, Your Honor –

MR. PEREZ: If Your Honor please, at this time I would like to make this remark. I think that this line of questioning is more damaging to the defendants, because the State has seen by evidence elicited by counsel for the defense that these two colored boys who are witnesses of the defendant had been proven to be the ones who were the aggressors, and I can't understand any further questioning along these lines which to me seemed to tend to prove the guilt of the defendant.

THE COURT: Well, these two boys are outside. They are not charged. Both Bernard and Bert are here and are going to be witnesses.

[39] MR. SOBOL: Do I understand that this is a motion?

THE COURT: Now, you're going into the fight on the school grounds. This may be –

MR. SOBOL: Your Honor, I'm trying to show –

THE COURT: – a serious thing. The Court realizes that you're trying to show, Mr. Sobol.

MR. SOBOL: Well, –

THE COURT: Does this have any bearing on your case?

MR. SOBOL: Your Honor, that's what I was trying to explain. I want to show the Court that these boys were

being threatened at the time Gary stopped; that there was a reason for him to believe they were being threatened; that this was his purpose for stopping. And I think that that has a good deal to do with the events that followed.

I also am attempting to prove that he did not hit Herman Landry, but I think that if I [40] could not give an explanation of why this fellow who was just driving by stopped the car, there would be some question raised about what he was doing there, what Duncan was doing at this scene with these high school boys, young boys. And I'm attempting to indicate to the Court, which I hope to do in addition to this cross examination by oral testimony, that this group was threatening or that there was good reason to think from the Duncan point of view, who was threatening these boys; who was in a fight that day who had to go to school for the first time, and had gotten into a fight, which I think the evidence will indicate, can hardly be called a fight in which they were the aggressor. And this was a continuance of this same thing; that these boys were being harassed on the highway, and that those were the events that lead up to the events that followed.

Now, I think that it's perfectly clear within the scope of cross examination. But, I just wanted to make clear what I was [41] getting at. Moreover, this exact incident, this exact spitting and talking was on direct examination, was testified to by the witness in response to Mr. Bubrig. And I'm thoroughly within the scope of cross examination.

THE COURT: There's nothing in there about this fight at school. That's what I'm getting at. Now, I have allowed this question to go under cross examination.

However, the facts of what went on on the side of this road in front of this restaurant, not what went on at school is what the Court is interested in; what went on on the side of that road.

MR. BUBRIG: Your Honor, I think everything that happened prior to Gary Duncan coming upon the scene would prove nothing since he would not have any knowledge of what went on prior to his arriving at the scene, that all this questioning of what happened while they were walk-

ing down the highway – Mr. Duncan didn't arrive at the scene until they reached [42] in front of the store, which would not lead him to believe anything until he got to the store – at least to the store, and all these other questions are irrelevant.

MR. PEREZ: That's the reason for my statement to the effect that this testimony is very harmful to the defendant, because the defendant happens upon the scene where he sees two colored boys and three or four white boys, and he gets out and he hits one of the white boys for no cause at all. Evidently he knows nothing about it.

Now, Counsel for the defense intends to introduce evidence that the defendant knew about it, then I would say he's getting his client in further trouble, because evidently, if that be the case, his client was going out and looking for these boys. I don't know if Counsel for the defendant will attempt to show that he called a deputy in anticipation of this fight, I don't know. But, that's the purpose of my statement in saying [43] that it's damaging to the defendant to exhibit this type of testimony.

MR. SOBOL: I don't know where we are, exactly. Is there a motion?

THE COURT: Well, there was an objection to your line of questioning – I would say a statement by Mr. Perez. You're damaging your client in your line of questioning. You're damaging him by asking these questions.

MR. SOBOL: I never heard of that as a basis for an objection before, Your Honor.

THE COURT: I can't see the relevancy of these questions; I truthfully can't, the fact that there was a fight at school and everything else – I don't see anything – what has that to do with the crime before me today?

MR. SOBOL: All this came in on direct, Your Honor. The first sentence out of this witness' mouth was it started with the fight upstairs, on direct examination. I think [44] this is the entire incident on the direct examination, which started long prior to the time Gary Duncan drove up.

The State has to prove its case beginning with the arrival of Duncan, so I will submit the question.

MR. PEREZ: Well, the State will withdraw its objection, Your Honor, but we'll re-emphasize the fact that a lot of this is immaterial, and that this matter could carry on for hours with other witnesses if we go through this same manner.

All I'm doing – the basis of my objection was to have the questions applied to the matter at hand, the crime which the defendant is charged with.

THE COURT: Well, if you withdraw your objection, I would say this: The Court finds it highly irregular and I'll state for the record to Mr. Sobol, I think you are in some ways, in the line of questioning, injuring your client in this line of questioning; however, if you wish to proceed, the Court is not going to stop [45] you, sir. This is not before a Jury.

MR. SOBOL: Thank you, sir.

THE COURT: The Court weighs all of this, and if I'm hearing all of this, I'm not going to say any more. You may proceed. The Court is not going to stop you right at the present time; however, try to limit yourself to the crime herein.

MR. SOBOL: Thank you, sir.

BY MR. SOBOL:

Q. What was this talk about this fight that you were having when you crossed the road? A. Oh, about how Bernard – well, this boy Tuddie hit him or something like that, and knocked him down. I don't know exactly how it went, because I wasn't up there. And while I wasn't too much listening to them – but, I was standing right close by them.

Q. You're talking about on the highway, now, aren't you? You're not talking about the – A. Well, I was talking about the fight at school. Ain't that what you're asking me about?

Q. No. When you crossed the road – I'm talking about [46] on Highway 23, opposite the grocery store, right before all this happened.

THE COURT: My recollection is that you asked him, when all the objections came about, you were asking him about the school fight. You asked him when he crossed the road, what was the talk about the fight. I think he gave you a responsive answer to your question.

BY MR. SOBOL:

Q. You were talking about what was said after you crossed the road. That's what I'm asking you? A. Yes.

Q. I see, good. And what happened then? A. Then – well, they was talking.

Q. Then Mr. Duncan went by and – A. And they went a little past, down on us. And then he backed up and come there by us where we was standing.

Q. And said what? A. Well, he got out the car and asked Bert what was wrong: And he said these boys want to fight. Herman said no, and he just asked them their name. And Mr. Duncan says, "You want to know my name?" And Herman says, "Yes." [47] And so, he asked Herman, "Can you read?" Herman said, "Yes." He said, "You still want to know my name?" Herman said, "Yes." "You all smart or something like that," and threatened to beat us all. And then he told Bert and Bernard to get in his car. And when he turned around to go towards – I guess to his car, Herman told me that – Herman said, "He must think he's tough." And he must have heard Herman when he turned around. Herman told – he asked Herman what he said. And that's when he struck Herman, after Herman told him what happened, what he said.

Q. And after he had told the boys to get in the car? A. Yes, sir.

Q. Let me see if I understand you. Was it your impression that Duncan and these boys were about to leave when he overheard Landry say, "He thinks he's tough," and then turned around; is that what happened? A. He told the boys to get in the car. When he turned his back, Herman told me that.

Q. Oh, Duncan also turned his back towards the car? A. I don't know if he was going to his car. But, he turned his back.

[48] Q. He turned his back and his face was towards his car, was it? A. Well, he had just started to turn around or turning around. The car was parked like that. He turned around. So, he had to be facing towards the river. (Indicating)

Q. I see. And he turned back around when he heard this remark? A. And walked over to Herman.

Q. And he hit him? A. Well, he asked Herman what he said. He said – Herman said, "You must think you're tough." And that's when he hit Herman.

Q. Did Herman scream or anything when he was hit? A. No, sir.

Q. What happened then? What did he say? A. Well, then – well, right after, when he hit him, said – Herman says something about going to call the cops or something like that, or something like that. And then right after he said that, Mr. Lathum hollered at Gary and told him to get out, get away or something, get out of here, or something like that. And he got in his car and he left. And then we walked over to the store. And then Mr. Lathum told us to stay there.

[49] Q. All right. By this time what you're talking about now, Duncan had left? A. Right.

Q. Was Herman hurt? A. No, sir.

Q. He was not hurt? A. No, sir.

MR. SOBOL: No further questions.

REDIRECT EXAMINATION

BY MR. BUBRIG:

Q. Randolph, you mentioned the name of Mr. Duncan several times. Who are you referring to? A. It's –

Q. Is that the defendant? A. Yes, sir.

MR. BUBRIG: No further questions.

THE COURT: You may step down.

MR. BUBRIG: I'd like to call Herman Landry, Jr.

HERMAN LANDRY, JR.
BOX 324
BURAS, LOUISIANA

after being first duly sworn by the Clerk of Court, did testify as follows:

DIRECT EXAMINATION

BY MR. BUBRIG:

Q. Your name is Herman M. Landry, Jr.? A. Yes, sir.

Q. How old are you, sir? A. Fourteen.

Q. Fourteen? A. (Nods head affirmatively)

Q. What is your birth date? A. August 27th.

Q. What was that again, please? A. August 27th.

Q. What year were you born? A. 1952.

Q. 1952? A. Yes.

Q. Do you recall an incident that happened on October 18th of 1966? A. (Nods head affirmatively)

THE COURT: Son, you're going to have to talk up so I can hear you, and the attorneys can hear you.

[51] THE WITNESS: Yes, sir.

BY MR. BUBRIG:

Q. Beginning – or would you explain to the Court what happened on the 18th? A. Well, me and Gregory Wayne and this other boy, we was coming out of school. We was going to the store. And we got out on the road, these two other boys was on the other side of the road. And I spit on the side of the road. And the other boy spit. And he spit on his sweater. And we laughed at him. And then we walked down the road, and we got in front of that little store, and Roggie told me to ask him his name. So, I asked him his name. And he said something. And we couldn't hear him, because some trucks was passing. So, then, he said something, oh, I don't know what he said. And Wayne went across the road to show him his birth certificate. So, we went to cross over. And they told us their names. We knew one of them had got in a fight in school. And we asked them what had happened. And he was telling us. Then, that boy right over there stopped in his car. And he backed up. [52] And he got out his car and he asked us what was going on, and we told him nothing. (Indicating) And then I told him nothing. Then he said what you all doing. I said, 'We're just asking these boys their name."

He said, "You want to know mine?" I said, "Yes." He said, "Can you read?" I said, "Yes." He said, "You still want to know?" "Yes." He said, "You're a smart little –" and then he said a curse word. And then I said, "No." Then, he told us he was going to beat us all up. And then I told that other boy, I said, "He thinks –" I said, "He thinks he's tough." That's when he slapped me. And then this other guy told him to – Bud Lathum was over at the private school, told him to go ahead. And then he called the Sheriff, and F. J. came. And that's the – and he asked us our name and –

Q. You say he threatened you? A. They – he told us he was going to beat us up if we got smart.

Q. Then he struck you? A. Yes, sir.

Q. How did he strike you? A. He slapped me on the arm.

Q. What did he hit you with? [53] A. His hand.

Q. Where at on the arm? A. Right here. (Indicating)

MR. SOBOL: What was the last question?

THE COURT: Read the last question.

(Question and answer read by the reporter.)

BY MR. BUBRIG:

Q. You stated that "he hit me," and you pointed – A. That boy right there. (Indicating)

Q. That's the defendant? A. Yes, sir.

Q. Do you know his name? A. Gary Duncan, I believe.

Q. Did you consent to him hitting you? A. I don't know what you mean.

Q. Did you agree that it was O.K. for him to hit you? A. No, no, sir.

MR. BUBRIG: I have no further questions.

CROSS EXAMINATION

BY MR. SOBOL:

Q. I didn't see where you pointed in response to the question where he hit you? A. [54] He hit me right here. (Indicating)

Q. A little above your elbow? A. Right above my elbow.

Q. He hit you hard? A. It stung a little bit.

Q. What's that? A. It stung a little bit.

Q. Stung a little bit? A. (Nods head affirmatively)

Q. Once, is that right? A. Yes, sir.

Q. Did you know Bert's name before this incident? A. No, I didn't.

Q. And did you know Bernard's name? A. Yes, I knew Bernard, because he played football.

Q. At the school? A. Yes, sir.

Q. Which of the two were in the fight? A. Sir?

Q. Which of these two boys were in the fight? A. I didn't know that. That's why I went across the road, to ask them.

Q. You didn't witness the fight? A. No, sir.

MR. BUBRIG: Your Honor, I'm going to object to this. This [55] was not opened on direct examination, anything about the fight, when this particular witness took the stand. He merely started when he was walking from the school. We're getting back to irrelevant questions.

THE COURT: He's already answered the question, he never saw the fight. I think the other two witnesses testified that he never saw the fight. I'm talking about the fight at school. He didn't know Bert, and he knew Bernard from playing football. He didn't know which one of them had been in a fight at school.

MR. SOBOL: I think the record would show, if we took the time to read it back, that the fight was mentioned on direct examination; not that it is important.

MR. BUBRIG: I withdraw the objection,then.

THE COURT: The witness is on cross examination as far as I'm concerned. It's highly irrelevant, [56] but proceed.

BY MR. SOBOL:

Q. You didn't witness this fight in this school, is that correct? A. No, sir.

Q. And your purpose in crossing was to ask them about the fight? A. Yes, sir.

Q. You wanted to know what happened, is that the idea? A. Yes, sir.

Q. And Wayne crossed the road first, is that your testimony? A. I don't remember.

Q. Which is the boy that had the birth certificate in his hand? A. Wayne.

Q. When you all crossed, where did you stand; when you crossed the road, where did you stand? A. On the other side of the road.

Q. In relation to Bernard? A. Sir?

Q. In relation to Ber. and Bernard, were you in front of them? A. Yes. I stood in front of them. I didn't stand in back of them.

[57] MR. PEREZ: Where?

THE WITNESS: In front of them.

BY MR. SOBOL:

Q. Where were the other three boys standing? A. Standing on the side of me, I guess.

Q. Did you ask them their names? A. Yes, sir, we asked Bert his name.

Q. And did he tell you? A. Yes, sir.

Q. He told you just Bert? A. Yes, sir.

Q. And then you began to talk about this fight, and that's when Duncan arrived? A. Yes, sir.

Q. And in response to Duncan's questions to what was going on, you said what? A. I said we was just talking; told him nothing at first, and then he asked us what we was doing. I just told him we asked these boys their name, and we was talking about a fight that one of hem had in school.

Q. You told him you were talking about the fight in school, is that right? A. No. I told him – I said we wasn't doing nothing, [58] at first.

Q. Yes. A. And then he asked us what we was doing there. And I told him we was just talking about a fight in school. And we was asking them boys their names.

Q. I see. Was that what you told him; now was it at that point that he said you want to know my name, too? A. Yes, sir.

Q. And you didn't know his name at that time, did you? A. No, sir.

Q. Now, after, you say he cursed at you, is that right? A. Yes, sir.

Q. And then what happened; what's the next thing he did? A. What you mean, after he asked me if I wanted to know your name, if I wanted to know his name?

Q. Yes. Then he cursed you, isn't that right? As I recall your testimony, after you said, "Yes, I do want to know your name –" A. He said, "You want to know my name?" He said, "Yes." He said, "Can you read?" He said, "Yes." He said, "You still want to know my[59] name?" And then he cursed.

Q. What I want to know is this; what happened next? A. Then he told us he was going to beat us all up if we got smart.

Q. And then what? A. Then I told Wayne that I guess, I said, "I guess he thinks he's tough." And that's when he hit me.

Q. Had he at that point told the boys to get in the car yet? A. Sir?

Q. And Duncan at this point, at that point that he hit you, had he told the boys to get in the car? A. I don't remember.

Q. You don't remember? A. (Shakes head negatively).

Q. What school do you go to? A. Boothville-Venice.

MR. SOBOL: I have no further questions.

MR. BUBRIG: I have no further questions.

THE COURT: You may step down, son. Go in the Jury Room and don't talk about this with Wayne and[60] other boy.

MR. BUBRIG: I'd like to call Mr. Lathum, at this time.

P. E. LATHUM
ROUTE 1
BURAS, LOUISIANA

after having been first duly sworn by the Clerk of Court, did testify as follows:

DIRECT EXAMINATION

BY MR. BUBRIG:

Q. How old are you, Mr. Lathum? A. Forty-two.

Q. Who are you employed by? A. I have my own business, Bud's Boat Rental Company.

Q. You're an independent business man, is that correct? A. I didn't understand your question?

Q. You're an independent business man? A. That is correct.

Q. Did you have occasion to witness an incident on October 18th, 1966? A. Yes. Would you repeat that? I didn't understand.

Q. On October 18th, 1966, did you witness an incident in Boothville, Louisiana? A. That is correct.

Q. Could you tell the Court what you witnessed? [61] A. I was in front of the — in the vicinity of the Safeway Stores in Boothville, when I noticed some teenagers standing in front of the Little Fish, on one side of the road. There were some white teenagers and on the other side of the road were some colored teenagers. And they seemed to be talking back and forth across the road. I could not hear their conversation. And after watching them for a few minutes, I noticed the white teenagers cross the street to the side where the colored teenagers were. And they were in conversation, which I could not understand. And about that time a car drove by going towards Venice. And he stopped in the middle of the road, and backed up and came across in front of the Little Fish Restaurant or Bar. And he pulled up beside the teenagers and a man got out of the car and went around the back part of the automobile and approached the teenagers, and said something to the two colored teenagers, which at that time they got in his automobile. And after a few seconds he was talking to the white teenagers. One of the teenagers was standing there with his [62] arm folded. The man made a pass at the white teenager, hitting him on the arm, knocking his arm up around his shoulders. And then he got in the automobile and went on down the road towards Venice. At that time I called the Deputy. And the teenagers walked over to the Safeway Store and sat down and waited until the Deputy arrived.

Q. How far were you from the teenagers? A. I'd say approximately 200 feet, maybe a little more, a little less.

Q. Did you actually see the hitting of one of the teenagers? A. He hit the teenager on the arm. At the time the arm went up and in this fashion. (Indicating)

Q. Do you know the name of the teenager that he hit? A. At the time he hit him, I did not know. I do not now. I understand it was one of the Landry kids. I'm not positive of this.

Q. Now, who was the party that hit the Landry kid? A. I don't know the man's name.

Q. Could you identify him if you saw him? A. I doubt it, not at that distance.

Q. You say you called the deputies; did they come immediately? A. The deputy came, oh, I would say within a half hour.

[63] It was my understanding that after I described the automobile to the Deputy on the way up the road he stopped his automobile or found this automobile.

Q. In response to your phone, was there an arrest made? A. I could not say if it was an arrest made or not. I do know that they picked the teenagers up, and the deputy come and talked to me. And the teenagers was in his automobile. After that, I'm not sure if an arrest was made or they were just being picked up or just what the score was.

MR. BUBRIG: I have no further questions.

CROSS EXAMINATION

BY MR. SOBOL:

Q. Mr. Lathum, could you see beyond the fact that this man had stopped the car and approached this group and hit a boy who turned out to be one of the Landry kids, the manner in which it was done, whether it was hard or easy or whether it was a serious attempt to hurt him or what; were you able to distinguish that? A. I seen him hit the teenager on the arm enough to [64] move his arm in an upper position.

Q. Where was the contact made on the arm? A. It was made on the arm – I mean I'm 150 feet from him, and the

teenager seemed to be standing in this fashion. And he hit him somewhere on the arm. Other than that, I couldn't exactly tell where he hit him on the arm. (Indicating)

Q. The arm that was like this went up, is that correct? (Indicating) A. That is correct.

Q. Did you actually see the man hit this boy prior to the time he hit him or did you see his arm going to hit him or did you see – was it the fact that this kid's arm flung up that led you to believe that he had been hit? A. He hit him.

Q. Did he wind up and hit him; do you have any idea? That's what I'm really getting at. A. If I would have been in the teenager's place, if the teenager wouldn't have moved in a backward position, he would have hit him harder than he did. He wouldn't have only hit him on the arm.

Q. The teenager moved backward, is that correct? A. That is correct.

[65] Q. To avoid –. A. I'm sure that anybody would.

Q. I see what you mean. A. That would be – if somebody is going to take a poke at him, that is the way he would defend himself, by moving backwards or getting out of the way.

Q. At this point the two Negro boys were in the car at the time this happened? A. The other children, the colored children?

Q. Yes. A. That is correct. And I'm pretty sure there was another person in the automobile. There were two persons in the automobile at the time it stopped.

Q. Did this other person get out? A. I don't think they did. I'm not sure.

MR. SOBOL: That's all the questions I have.

MR. BUBRIG: That's all.

(Recess)

MR. SOBOL: I call Bert Brown.

THE COURT: Has the State rested?

[66] MR. BUBRIG: The State rests, Your Honor.

BERT GRANT
ROUTE 1, BOX 181
BOOTHVILLE, LOUISIANA

after having been first duly sworn by the Clerk of Court, did testify as follows:

DIRECT EXAMINATION

BY MR. SOBOL:

Q. Bert, how old are you? A. Fourteen.

Q. And what school do you go to? A. Boothville-Venice High.

Q. When did you enter that school? A. The month that I entered?

Q. Well, approximately when, do you know? A. About a week the schools opened.

Q. Do you recall an incident on October 18th, 1966, involving the defendant, Mr. Duncan, and some boys on Route 23? A. Yes, sir.

MR. PEREZ: Excuse me. Could the witness talk a little louder?

THE COURT: [67] Yes. Will you please, so I can hear you talk where I can hear you and everybody out there – not in the audience, but these people right here can hear you?

THE WITNESS: Yes, sir.

BY MR. SOBOL:

Q. Approximately what time of day was this incident? A. About 3:30.

Q. Was it after school? A. Yes, sir, after school.

Q. Had you gone to school that day? A. Yes, sir.

Q. And what happened when you left school? A. Well, I had missed the bus, and I had to walk home.

Q. You had missed the bus? A. Yes, sir.

Q. Yes. A. And me and my friend, we was walking home.

Q. Who's your friend? A. Bernard St. Ann.

Q. Bernard St. Ann? A. Yes. And these four boys, they was on the other side of the street. They hollered at us. They said, "What you all name?" We kept walking.

[68] We didn't pay no attention to them. So, they

came on the side we were. They stopped us. They got in front of us, and they said, "We asked you your name." I said, "None of your business what my name is." They said "We just want to know your name." Then, we started arguing, and that's when Gary saw us standing up there, backed up, got out the car. He said, "What's wrong, Bert? And I said, "These boys, they want to fight." He said, "Why you all want to fight, boy?" He said, "They didn't – don't want to fight." "We just want to know his name." Then, Herman Landry, he said something, and Gary said, "Well, best out for you is to go on home." And he touched him on the elbow right there. (Indicating)

Q. Touched him on the elbow? A. We got in the car and pulled off, and Herman Landry said, "My people can put you in jail for that."

Q. Well, let's back up a little bit. Had you seen these boys before? A. Yes, sir, in school.

Q. Well, what made you say to Gary that these boys had wanted to fight, if all they had said to [69] you is what's your name? A. Because he was in the bathroom for the recess. They wanted to jump me in the bathroom. And they asked me if I wanted to fight. I said, "No, I don't want to fight." They had a gang of them wanted to jump me. And the teacher came in there and he stopped us and told me to go ahead to my class.

Q. This is in the school, now? A. Yes, sir.

Q. Were these some of the same boys? A. Yes, sir, except for one of them. This other "Ruggie," he wasn't in there. But, the other three –

MR. PEREZ: It is very difficult for me to understand, Your Honor.

THE COURT: It is for me and I'm sitting right here.

THE WITNESS: "Ruggie," and he wasn't in there. But, Herman Landry and Wayne Scarbon, they were in there.

BY MR. SOBOL:

Q. There were four boys on the road, is that correct?

A. Yes, sir, four was on the road.

[70] Q. And as far as you know, their names are Wayne Scarbon – what's the other Scarbon's name? Randolph Scarbon and the other Herman Landry and one other boy? A. Yes.

Q. How many of these four were in the group at the school? A. They had three of them in the school, in the bathroom. Westley McKernley (spelled phonetically), Herman Landry and Rudolph.

Q. Randolph? A. Rudolph – Randolph, yes.

Q. Now, when Gary touched Landry on the arm, that's a very important thing –

MR. PEREZ: If Your Honor, please, the State will request counsel for defense not to emphasize the questions to the witness, but to ask them in plain English, without emphasis and without self-serving emphasis, I might add.

MR. SOBOL: Is that a motion?

THE COURT: Proceed, Mr. Sobol.

MR. SOBOL: [71] Strike the question. I'll start again. Is that what you want, is that correct? I never heard of a request on examination – if it's an objection, perhaps it was a misphrased question. I'll phrase it again.

BY MR. SOBOL:

Q. Referring back – let me start a step further. Is the defendant a relation of yours? A. St. Ann?

Q. No, Gary Duncan? A. Yes, sir.

Q. He is related to you? A. Yes, sir.

Q. What's the relationship? A. My cousin.

Q. Your cousin? A. Yes.

Q. Now, would you describe to the Court the circumstances and the manner in which he touched or whatever he did do to Herman Landry, on the elbow? A. Well, he said like this here – (Indicating)

Q. Well, why don't you –

THE COURT: You're going to have to talk up loud.

THE WITNESS: [72] He said like this, "Best out for you to go on home," like that, on the elbow.

BY MR. SOBOL:

Q. That's all? A. That's all.

Q. Did you witness that – I mean did you hear about it or did you witness it? A. (No answer)

Q. Did you see it? A. I saw it, yes, sir.

Q. Did it look to you like Landry had been hurt? A. No, sir, he isn't.

Q. Did it look to you as though Gary was trying to hit him? A. No. I would call it an expression, the way he did it. I don't know how to explain it. But, I know he just touched him on the arm. To me, it was an expression. He just said, "Best out for you is to go on home." And he just touched him on the elbow.

Q. And what happened next? A. Well, he got in the car. Emile pushed over, and Herman Landry said, "My people can put you in jail for that."

Q. And then you drove off with Gary? A. Yes, sir.

[73] Q. And Bernard, is that correct? A. Yes, sir.

MR. SOBOL: I have no further questions.

CROSS EXAMINATION

BY MR. BUBRIG:

Q. You stated under direct examination that you knew there were three boys in the bathroom. That was also on the side of the highway? A. Yes, sir.

Q. How do you know that? A. I saw their faces.

Q. Do you know them all by name? A. I know – yes, sir, I do.

Q. Could you name them at – right now? A. Wesley McKinley, Herman Landry and Rudolph.

Q. Wasn't there four? A. There were four on the road.

Q. Did you know them at the time of the incident in the bathroom? A. Yes, sir, I knew them.

Q. You're certain? A. Yes, sir.

Q. You stated that the defendant touched or – I don't know the exact words, the Landry boy on the arm. Where were you at the time of this [74] touching? A. Inside the car, looking out the window.

Q. In which direction was the car headed? A. The car was on an angle, like right – this – the car was like that. (Indicating)

Q. Were you in the front seat or in the back seat? A. I was in the back seat, and the window was rolled down. And I was looking out the window on the side where we were.

Q. How close were they to the car? A. I'd say about from where I'm at to that thing there. (Indicating)

Q. Was Gary facing you, Gary Duncan? A. No, sir. Gary was facing the boy, and it was farther back to the car, farther in the back.

Q. In other words, Gary Duncan had his back to you? A. Yes, sir. He had his back to me.

Q. And where was the Landry boy? A. He was facing the car, and his back –

Q. He wasn't facing Gary? A. Gary was facing – he was facing from the road.

Herman Landry and Gary had his back on the car.

Q. Who had his back on the car? A. He – Gary had his back on the car. He was facing back to the car, and Herman Landry was facing the car.

[75] Q. In other words, Gary was between you and the Landry boy? A. No, sir. He was further back to the back of the car.

Q. But, you stated that the – Gary's back was towards you? A. Yes, sir. His back – he was facing the car, but he wasn't quite in front of me.

Q. Could you see Gary's face? A. No, sir. I could see the side, his face, but I didn't.

Q. Then he wasn't to the – I mean, you never had the back of the car, – if you were sitting in the car, he didn't have his back to the car, if you could see the side of his face? A. His back was to the car. But, he was further back to the car.

Q. Could you see all of the motions of his hands? A. No, sir. I saw when he touched him on the arm. That's all. That's the only time he raised his hand.

Q. In other words, you're sitting in the car, and a man has his back to the car and you could see exactly how he handled himself through the man's back. A. I could see the side of him. You see, he was to [76] the back. He

was further in the back of the car. But, I still could see from the side.

Q. You're in the back seat and the man has his back to the car, and you could see the motion of his hand in front of him? A. I could see from the side, yes.

Q. Now, you stated that Gary told something to Herman. What did he tell? A. Yes. He got out the car and he say, "Why you all want to fight?" They say, "We just want to know their names."

Gary, he said, "You don't need to know his name."

And Herman said something back, and Gary says, "Best for you is to go on home," and touched him on the elbow.

Q. Did he curse him? A. No, sir.

Q. Are you certain? A. I'm positive.

Q. You also stated that the car pulled off and then one of the boys said, "My people can put you in jail?" A. Herman Landry said that.

Q. Tell me, how could he pull off and you still here this statement? A. See, we wasn't quite on the road. We was pulling [77] off. The car hadn't "droved" off yet. We was in the car, and the motor was started. And he hollered out, he said, "My people can put you in jail for that."

Q. For what? A. For touching him on the elbow, I guess.

Q. Just touching him on the elbow? A. That's all he did.

Q. You're certain all he did was just touch him on the elbow, although the man had his back to you? A. Yes, sir.

Q. And you could see through the man? A. I could see from the side of him.

MR. BUBRIG: I have no further questions.

REDIRECT EXAMINATION

BY MR. SOBOL:

Q. I think you'd better explain – perhaps you could draw a picture of who was where so that the Court will understand how you were able to see what happened. Why don't we say that this is the road, and you take it from there. This is south and this is north, O.K.? And this is up to-

wards New Orleans, and this is south. O.K.? You understand what I'm [78] talking about? And this is the road. Why don't you draw the car. First, where was the car parked? (Indicating) A. Yes, sir, right here. (Indicating).

Q. So we understand each other, this is off the side of the road on the east side of the road? A. Right. Now, this is back. I was back here, and Gary was standing up here. And Herman Landry was up here. I could see from this side, Gary was here, and Herman Landry was standing right like that. (Indicating)

THE COURT: Where's the front of the car?

THE WITNESS: This is the front. I was back here, right here in the back of the seat on this side. (Indicating)

THE COURT: I can see.

THE WITNESS: And so, then, Gary just touched him on the arm, and he came and got in the car and then "droved" off. And he stopped like this here to see if any cars was coming – I mean he stopped like that. Herman Landry [79] hollered and said, "My people can put you in jail for that." And we just drove off. (Indicating)

MR. SOBOL: That's all the questions I have.

THE COURT: The Court has one thing that I don't think either one of you cleared up with this witness, and it's got me a little confused right now between all of the witnesses. Let's get something straight, son. When Gary Duncan backed up and he got out of the automobile –

THE WITNESS: Yes, sir.

THE COURT: – he talked to the Landry boy, I believe his name is?

THE WITNESS: He asked him why he wanted to fight.

THE COURT: At what time during this conversation did you and Bernard – Bernard is the other boy?

THE WITNESS: Yes, sir.

THE COURT: [80] What time during this conversation did you all get in the automobile?

THE WITNESS: After Gary asked him why he wanted to fight us. He said, "Why you want to fight?" We said we never. He said, "Well, you all get in the car." And

that's when Herman told him something. I don't know. I don't remember exactly what he said. But, he said something. Gary said, "It be best to go on home."

THE COURT: Now, did this take place like you and I are talking here; he told you all to get in the automobile, and then the Landry boy turned – he turned to the Landry boy and said, "Best thing for you to do is go home?"

THE WITNESS: Yes, sir. Herman told him something, and Gary told him that after he told him something.

THE COURT: This happened while you all were getting in the car?

THE WITNESS: [81] Yes, sir. I was in the car when Gary touched him on the elbow.

THE COURT: I have no further questions, gentlemen.

MR. SOBOL: That's all, Bert.

I call Bernard St. Ann.

BERNARD ST. ANN
ROUTE 1, BOX 184
BOOTHVILLE, LOUISIANA

after being first duly sworn by the Clerk of Court, did testify as follows:

DIRECT EXAMINATION

BY MR. SOBOL:

Q. Bernard how old are you? A. Sixteen.

Q. And what school do you go to? A. Boothville-Venice High School.

Q. What grade are you in? A. Seventh.

Q. Do you recall an incident on October 18th, 1966, on Highway 23, involving the defendant, Gary Duncan, and yourself and some other boys? A. Yes, sir. We was coming from the school, and those boys, four boys was coming. And they was [82] walking. And they asked us our name. And they say, "Your name Bert?" And another, the other one started laughing. And then they come on the other side of the road where we was. They got in front of us. They stopped. Then, Gary passed. He backed up,

and he said, "What's wrong?" They said, "The boys want to fight." Gary say, "What you all boys want to fight?" And the boys say, "We just want to know his name." One of them say – and then, Gary said, "You all get in the car." And Gary say, "You all best ought to go home," and just touched the boy on the arm. We got in the car and left.

Q. Who told Gary that the boys wanted to fight? A. Sir?

Q. Who told Gary, when he stopped and asked, that these boys wanted to fight? A. Bert.

Q. Was there any reason to think they wanted to fight? A. The way they was talking like, you know, they came on the same side on the road we was on.

Q. I understand – A. They came on the side of the road we was on. They got in front of us, and then they wanted to [83] fight, the way they was talking.

Q. Was there a point in which Gary told you to get in the car, his car? A. Oh, yes, sir. He said, "Get in the car."

Q. And you did? A. Yes, sir.

Q. And was that before or after he touched Herman Landry on the arm? A. It was after, I believe.

Q. It was after, you believe? A. (Nods head affirmatively)

Q. Were you outside the car when this happened, in other words, when you observed the contact – when you observed Gary touch Herman Landry you were not sitting in the car, but you were standing outside? A. Yes, we was fixing to get in the car.

Q. Where were you standing? A. I was standing on the right side, on the right side of the car.

Q. Right side of the car. The car is pointing south? (Indicating) A. (Indicating)

Q. And how far were you from Gary and Herman Landry? A. I wasn't too far, about like that, I'd say. (Indicating)

[84] Q. What did Gary say to Herman Landry before he touched him? A. He just say, "You best ought to go ahead home."

Q. Would you get up and show me exactly what he did to him? A. He just says, "Best ought to go home," just like that. That's all. (Demonstrating)

Q. Would you say that he hit him? A. No, sir.

Q. And how far away were you when that happened? A. I'd say about like from here to you, something like that, a little further.

Q. Had you been in the fight in school with these boys or any of these boys who were on the road? A. I had one that day, is all.

Q. You had had a fight that day? A. Yes, sir. A boy hit me, is all.

Q. In school? A. Yes, sir.

Q. Where did this take place? A. In the hall.

Q. It wasn't the same boys, though, was it? A. No, sir.

MR. SOBOL: I have no further questions.

CROSS EXAMINATION

[85] BY MR. BUBRIG:

Q. Bernard, you stated that one of them told – I think it was the other boy, Bert, told Gary that they wanted to fight? A. Yes, sir.

Q. What made you think they wanted to fight? A. Because the way they was talking, saying, "Your name is Bert," and was making fun of us. And while they was talking, they was coming across the road where we was, and got in front of us.

Q. In other words, because they were walking on the same side of the road you were on, walked over to the same side of the road and asked you your name, that automatically meant, to you, that they wanted to fight? A. Yes.

Q. And you just stated that you had one fight, one fight that day? A. Yes, sir.

Q. You only had one fight or more than one? A. No. I was walking – a boy hit me. That's all, one time.

Q. In other words, you were victimized? A. Uh-huh.

Q. Now, you indicated to Mr. Sobol how Gary touched [86] the Landry boy. What arm did he have contact with? A. I don't know for sure.

Q. You don't know? A. Not for sure.

Q. Are you sure that it was just a touching and not a hit? A. He didn't hit him. He just touched him.

Q. You don't know which arm? A. I don't know for sure.

Q. Are you in the car at this time or out of the car? A. I was fixing to get in.

Q. Where was Bert? A. Bert was getting in, too, I belive.

Q. Bert had not gotten into the car yet? A. I don't believe.

Q. But, you're certain that it was only a touch? A. I was sure it was just a touch.

Q. But, you don't know whether or not – you're not certain whether you were in or out; you're not certain? A. I was getting into the car.

Q. You were getting into the car? A. Yes.

Q. And Bert was still out, too, you don't recall which arm – [87] A. No, I don't.

Q. When you were getting in the car, did you open the door; were you in the process of getting in? You say you were getting in the car or were you headed towards the car? A. I was fixing to get in the car.

Q. In other words, you should have been looking where you were going, is that correct? A. Yes, sir.

Q. And if you were walking – if you were watching what you were doing, you'd be looking into the car, getting into the car? A. No. See, the door like that. And I had my head turned.

Q. In other words, you were just watching what was going on, looking and watching? A. And getting into the car.

Q. But, you definitely know that Gary had contact with the Landry boy's arm? A. He just touched him on the elbow.

Q. And you're positive of the place? A. Somewheres along here. I don't know for sure. (Indicating)

Q. You say elbow? A. Elbow.

Q. You're sure it's elbow? [88] A. One arm – it was just on his arm, I know.

Q. Did he touch it with the front of his hand or the back of his hand? A. Just like that. (Indicating)

Q. With the front? A. (Nods head affirmatively)

Q. But, you don't know which one – which arm? A. I don't know. No, I don't know for sure.

Q. Did the Landry boy ask the defendant to touch him? A. No.

MR. BUBRIG: No further questions.

REDIRECT EXAMINATION

BY MR. SOBOL:

Q. Bernard, why is it that you can't recall which arm it was? Was it because you don't recall which is right and which is left – I mean couldn't you figure that out? A. The left one, I believe.

Q. The left? A. Left.

MR. SOBOL: No further questions.

MR. BUBRIG: I have no further questions.

THE COURT: [89] Step down.

MR. SOBOL: I call the defendant, Gary Duncan.

GARY DUNCAN
BOOTHVILLE, LOUISIANA

after being first duly sworn by the Clerk of Court, did testify as follows:

DIRECT EXAMINATION

BY MR. SOBOL:

Q. Would you state your name for the record? A. Gary Duncan.

Q. You're the defendant in this case? A. Yes.

Q. Where do you live? A. Boothville, Louisiana.

Q. How old are you? A. Nineteen.

Q. And where are you employed? A. Mitch Acola. (Spelled phonetically)

Q. What do you do at that company? A. Captain.

Q. Captain of what? A. Towboat.

Q. Towboat. How long have you been working on the [90] boat? A. On the boats?

Q. How long have you been doing that? A. Oh, about three years.

Q. Three years. And you're captain of a tugboat? A. Yes.

Q. All right. Prior to your being arrested in this case, have you been arrested and charged with any crime before?

MR. BUBRIG: Objection.

MR. SOBOL: Objection?

MR. BUBRIG: I withdraw the objection.

MR. PEREZ: I may state this, if Your Honor please, if counsel for the defense is going into the defendant's character – is that the purpose?

MR. SOBOL: Sure it's the purpose.

MR. PEREZ: All right.

THE COURT: I would imagine that is what the purpose is.

[90] MR. SOBOL: Sure it's the purpose.

BY MR. SOBOL:

Q. Have you been arrested prior to the arrest in this – well, there were two arrests in this case, but prior to this case, had you been arrested and charged with any crime before? A. No, sir.

Q. And when you were arrested on this case, the first time, who posted the bond for you? A. Herbie Collette.

Q. Who is that? A. That's the owner of the boat.

Q. That's your employer? A. Yes.

Q. Do you recall the afternoon of October 18th, 1966, there was an incident involving you on Highway 23? A. Yes.

Q. Would you describe to the Court from your point of view, starting from before you got there and following through until you left, what happened? A. Well, I was heading south on Highway 23, and I seen these six boys. Two are my cousins and these [92] four white boys was

on the road. They was standing in the front of me. I stopped in the front of the cajun – this pipe company, backed up. I said, I asked Bert what's wrong. I asked Bert what's wrong. He said, "These boys want to fight." I told him to get in the car, and I told the boy, Herman Landry, I asked him – he say, "I just asked him his name." "Well, you don't suppose to ask him his name." And he say that he – when I told Bert to get in the car, and then I asked him if he wanted to know my name, and he said, say, "Yes." I said, "There it is on my shirt." I say, "You still want to know it?" He say, "Yes." I told him my name. I turned around and went to get in the car. And he say something. I turned around and say, "What you say?" And that was all of that. I told him, "You best ought to go home." I touched him on his shirt, on his right elbow. And that was all. I went and got in my car, and as I was pulling off, he said that his people would put me in jail for that.

I didn't pay no attention to him. I went and pulled off, and I think I went down the road [93] about two miles and F. J. called me. He said they wanted me at the store. I told him – he told me to park my car on the side of the road and come with him. And I went on with him. And the boy was at the store.

Q. O.K. You state right elbow, and you pointed to your left elbow. Which elbow do you mean? A. Well, I meant to say the left, because he was like this here. I meant to say the left, because my – I was facing him, and he was facing me.

Q. Why did you stop the car when you were driving on highway – A. Well, I – because I figured something was wrong, because that wasn't no – the boys habit to stand on the side of the road and talk to white boys. And I backed up and wanted to know what was going on.

Q. You knew Bert and Bernard and one was your cousin, and Bernard was someone you also knew? A. Cousin.

Q. They're both cousins? A. Yes.

Q. And your purpose in stopping was to find out what was going on? [94] A. That's right.

Q. And what was your purpose in touching Herman Landry on the arm? Why did you touch him at all? A. That was just out of an expression.

Q. Sir? A. Out of expression. I didn't mean no harm or nothing by touching him.

Q. Well, why did you touch him? A. Just expressions.

Q. How do you mean expression? A. Just tell him to go ahead on home. That's about all I could do. I told him to go ahead on home.

Q. Did you touch him hard enough to hurt him, do you think? A. No.

MR. SOBOL: I have no further questions.

CROSS EXAMINATION

BY MR. BUBRIG:

Q. Gary, you say that you're employed as a captain on a tugboat. Are you a licensed captain? A. No. A license is not necessary for the kind of work I'm doing for the boat.

Q. Are you a captain or in fact a deck hand? [95] A. I'm a captain.

Q. I asked the question since on the police report it was a deck hand. Gary, when your attorney asked you whether or not you had been arrested before or picked up before, you stated never or no? A. You say criminal or for something like this here.

I been arrested for no driver's license and for speeding, and reckless driving.

Q. How many times were you picked up for these offenses? A. Twice.

Q. Could you give the dates of these? A. I couldn't give you the date.

Q. Do you remember being picked up on April – well, let's see, let's go back to June, 1965. A. You asked me that. That's when they picked me up for no driver's license, I believe.

Q. What about April 27th – A. 27th or April 25th. That was during Easter. I wasn't picked up. I was gave a ticket.

Q. And what did you plead on that? A. Guilty – I mean at least I was guilty, but I never plead Court. I paid. I did it downstairs. Then on June 22nd they had picked me up for reckless driving.

[96] Q. Do you recall the sentence? A. Do I recall the sentence?

Q. Yes, sir.

THE COURT: Which one, Mr. Bubrig?

BY MR. BUBRIG:

Q. The last one, the last time? A. I was fined.

Q. You were given a suspended jail term upon payment of the cost of the fine? A. I don't remember.

Q. Were you not fined $100.00 and costs? A. Yes.

Q. And thirty days? A. I don't remember the thirty days.

Q. The thirty days was suspended. Did you, when you stopped at the scene, have any reason to stop there other than seeing six teenagers? A. The reason I stopped was the boys was standing on the side of the road, Bert and Bernard.

Q. You stopped every time and see Bert and Bernard on the side of the road? A. If I see them walking on the road, yes. If I see them on the road, yes, I'm going to stop. I'll stop.

Q. Is that the reason you stopped, just because they [97] were on the side of the road? A. That was one of the reasons, and the other reason was because the four boys was there. And I asked them what was wrong.

Q. Why would the presence of four boys make you stop on the side of the road? A. I figured something was wrong, because they wasn't in the habit of standing on the side of the road and talking to nobody, and you know, they wasn't supposed to be on the road.

Q. Why weren't they supposed to talk to anybody? A. Why they wasn't supposed to talk to nobody?

Because they was supposed to be home.

Q. Did you threaten the four white boys that were on the side of the road? A. No.

Q. You didn't tell them anything? A. No.

Q. In other words, those three boys, all three of them were lying when they took the stand? A. They were lying when they said I threatened them, and that I was meaning to hurt the boy when I touched him on the arm. I feel that fairly, before, if I wanted to hurt him I could have hurt him, and I ain't never had no intention [98] to hurt him.

Q. Did he consent to your touching him on the arm? A. Did he consent?

Q. Did he say, "Go ahead and hit me?" A. No.

Q. And did you have contact with him in any way? A. Yes. I had contact with him.

Q. Really, you weren't guiding him as you might walk this way, is that right; didn't you kind of hit him backhand, and tell him to get out of here? A. I touched him with my hand. I said, "You might as well go on home."

Q. How did you touch him with your hand? A. What?

Q. How did you touch him with hour hand? A. The flat part of my hand.

Q. How did you touch him? A. On his elbow.

Q. You're certain it was his elbow? A. I'm positive.

Q. It couldn't have been a little higher? A. No.

Q. Where were the boys, the two boys you stopped to pick up when this happened? A. Where was they?

[99] Q. Yes. A. On the side of the road, in the front – on the front, the little fish, and speedway.

Q. They were in the car? A. What?

Q. They were in the car, Bernard and Bert? A. Yes. They was in the car.

Q. Well, then, your witness was lying?

MR. SOBOL: Your Honor, I object to the question about who was lying and who is not.

MR. BUBRIG: It is his own witness.

MR. SOBOL: Your Honor, I object to asking questions of that type, both as to his witnesses and eye witnesses. The witness is supposed to testify to the best of his recollection, not categorize anybody else's testimony.

THE COURT: There's another way to ask the question. I'll sustain the objection.

BY MR. BUBRIG:

Q. Was your witness telling the truth? A. Yes, he was telling the truth. I failed to [100] believe that he got a little confused with your asking him questons that would confuse him. (Sic)

Q. Why would it confuse Bernard? A. Why it would confuse him?

MR. SOBOL: Your Honor, I object to the question of why it would confuse Bernard.

THE COURT: That question is in response to an answer by the defendant.

MR. SOBOL: The defendant obviously didn't know why Bernard is concerned. I think the question about whether somebody else is lying or telling the truth is an improper question, and I object to it.

MR. PEREZ: If Your Honor please, the State will withdraw those questions. This is not a trial by Jury, but the Court has the same right to judge a witness, as does a Jury, as to whether or not he's telling the truth.

THE COURT: The question has been withdrawn.

[101] MR. PEREZ: Yes.

MR. SOBOL: The objection is now moot.

BY MR. BUBRIG:

Q. Then, Bernard may have been a little confused about what went on? A. Yes.

BY MR. PEREZ:

Q. Duncan, you had stated in response to the questions asked by your attorney, that you had never been in trouble before, and then Mr. Bubrig asked you, and he recalled to you that you were charged on three different occasions, is that correct, isn't it? A. I failed to believe I understand. My lawyer asked me if I was ever picked up for something like this here before. He didn't say nothing about no traffic tickets, traffic violations. (Sic)

Q. And you also stated that for how many years you've been a captain on this tugboat? A. He asked me how many years I been working on a boat.

Q. Yes. [102] A. I told him about three years. He never asked me how long I been a captain on a boat.

Q. What was your occupation or what were your duties on these boats for three years? A. I was deck hand sometimes and I was captain. Now, on this boat here that I am working on here, now, when they first picked me up for this, I was working deck hand.

Q. Well, is it – A. Now, I'm working captain.

Q. Is it not true when you were arrested on April 26th, 1965, that Deputy Simmons asked you your occupation, and you told him that you were a fisherman? A. Yes.

Q. And I ask you also, is it not true that the reason for your being picked up was that Deputy Simmons was notified by a passing motorist that you were driving a 1955 Pontiac, blue and white automobile, with an Alabama license, and had passed this motorist in a curve about ninety miles an hour, is that correct? A. No. Explain yourself again about that?

Q. Well, I'll ask the question in another way. Did not Deputy Simmons advise you that the reason [103] he picked you up on April 26th, 1965, that a motorist, a passing motorist advised the Deputy that you had passed him in a curve at a speed of ninety miles an hour. Did Deputy Simmons tell you that?

MR. SOBOL: Your Honor, I object to that question on the grounds that it calls for hearsay evidence.

THE COURT: Hearsay evidence?

MR. SOBOL: Hearsay, what the Deputy said to him.

THE COURT: This is the defendant.

MR. SOBOL: It's not what he said. It's what the Deputy said.

MR. PEREZ: If Your Honor please, any statement made in the presence of the defendant is admissible.

MR. SOBOL: That's just not right. Any statement by the defendant is admissible. Any statement to the defendant is for that reason –

[104] MR. PEREZ: If Your Honor please, this is –

THE COURT: This has nothing to do with this.

MR. PEREZ: With this particular case, I know, but the defendant is – his counsel has gone into the character of the defendant, and for that reason I am asking these questions. And once the defendant does that, the whole case is open to the State.

MR. SOBOL: The hearsay rule is waived, because I have gone into the character of the defendant?

THE COURT: The hearsay rule is not waived. I don't see where this is hearsay.

MR. SOBOL: What the Deputy said to the defendant is exactly what hearsay is. I don't object to the line of questioning. I have opened it up. They have a right to pursue it, but they have a right to pursue it within the rules of evidence. This is, I think, obviously hearsay evidence, and [105] I'll object to it.

MR. PEREZ: If Your Honor please, I withdraw the question and rephrase it.

BY MR. PEREZ:

Q. Do you recall Deputy Simmons advising you how or for what reason he arrested you on April 26th, 1965? A. Oh, he arrested me for no driver's license, but he told me that a car, a person had said I run him off the road. But, that wasn't true.

Q. Now, at eleven minutes after midnight on July 5th, 1966, were you arrested by Deputy Buras? A. Yes.

Q. And did you at the time give your occupation as a fisherman? A. Yes, at that time I was fishing.

Q. And is it not true that Deputy Buras advised you that while he was patrolling on Highway 23, he observed two subjects racing, headed south; that he turned around and caught you after clocking you at ninety miles per hour.

MR. SOBOL: Your Honor, I object to the question on the same grounds as the prior objection, presently.

[106] MR. PEREZ: I'll rephrase the question. I will withdraw the question and rephrase it.

BY MR. PEREZ:

Q. Were you not charged with speeding at ninety miles an hour on that particular date? A. Yes, I was. That's what I was charged with.

Q. And did you not plead guilty to that charge, and you were sentenced to $100.00 and costs, and given thirty days? A. Yes.

Q. And you were given thirty days in jail, and the sentence was suspended? A. I was charged $110.00, yes.

Q. And is it not true that Deputy Buras apprehended you after you had parked your car in a friend's yard, and you ran home; is that not true? A. No. I was in the bed when he came. I wasn't trying to run from him or nothing.

Q. And is it not true that the other person with whom you were racing, Deputy Buras had gotten information from him? A. Deputy Buras talked with him.

Q. Now, you stated that you did touch this Landry boy on the arm, is that correct? [107] A. That is correct.

Q. Did he ask you to touch him on the arm? A. I belive I told the attorney that he did not told me.

Q. He did not. So, you touched him on his arm without his consent or permission, is that correct?, A. That is correct.

MR. PEREZ: No further questions.

REDIRECT EXAMINATION

BY MR. SOBOL:

Q. Gary, the question I asked you is whether you had been arrested and charged with a crime, and your answer was no. And you don't want to change that answer, do you? A. Explain that.

Q. You have not been arrested and charged with a crime, have you? A. That's right, yes, sir.

Q. Yes, sir, you have not been? A. That's right.

MR. SOBOL: No further questions.

MR. PEREZ: Well, in response to that I'll have to ask one [108] question or I'll reserve it for argument, if Your Honor please.

MR. SOBOL: The defense rests.

THE COURT: Step down.

MR. PEREZ: The State rests.

(Argument by counsel)

THE COURT: Mr. Sobol, you brought out an interesting point in your closing argument; a very interesting point. The Court will take into consideration in deciding this matter, your client, in passing up six kids – I call them kids. They are under the age. They are all under the age of seventeen, other than Leonard – I think Leonard said he was sixteen. They were all under the age of seventeen. So, they're all kids under the eyes of the Court.

At the time that this incident happened, things were of such a nature in that end [109] of the Parish – we should take that into consideration.

The fact that six boys were standing on the side of the road would mean nothing to anyone who would be driving by. I think the fact that it was four white boys and four colored boys – I have witnessed this myself, and I am sure you have on many occasions. I'm sure the defendant has, where there are conversations on the side of the road between white boys and colored boys; however, you described the civil law definition of battery. The Court is well aware of it, a mere touching. But, you have something else here, the prankish tap of one by another, not in anger, but in skylarking, and both being friends, is not an assault and battery. This was in two cases cited in the Code under Section 33. And in these two cases it said every touching or holding, however trifle of another person, or his clothes, an angry resentual, rude or insolent or hositle manner shall be battery, as defined in the Code under [110] the Revised Statute Title 14, Section 33.

The two witnesses for the defense, one witness stated he was in the back of the car, and they were behind, further back from the car, yet he saw what went on. The other witness takes the stand that neither one of them were in the car, that they were getting in the automobile, and Mr. Lathum testified that he was 150 to 200 feet away, yet he saw the blow. And he say the boy's arm go up in the air

from the blow. And he stated that if the boy would not have backed up, it would have been even more serious.

The Court taking into consideration Mr. Lathum's testimony, a man who was not even in the discussion, or whatever we may call it between six boys on the side of the street, and the testimony of the victim himself, Mr. Landry, that this blow was sufficient to sting him, I think the State for those reasons has proved to me beyond a reasonable doubt that the defendant is guilty of simple [111] battery.

Will you stand up, Gary Duncan.

(Defendant complies with the Court's order)

THE COURT: The Court is going to find you at this time —

MR. SOBOL: Your Honor, we'd like to have a delay.

THE COURT: I will give you a delay between the verdict and the sentencing. I'm going to render my verdict now.

MR. SOBOL: I see.

THE COURT: Under the law, you must wait a minimum of twenty-four hours before sentencing, unless it's so specifically waived. Is that what you mean?

MR. SOBOL: Yes, sir.

THE COURT: If you don't waive your delays, I can't sentence him this afternoon.

The Court at this time finds you guilty of the crime of simple battery. The Court [112] will at your request — you do not wish to be sentenced this afternoon. You want a delay?

MR. SOBOL: Yes.

THE COURT: The Court will delay sentencing until next week at 10:30.

MR. SOBOL: If Your Honor please, if we could have it Wednesday afternoon, because I have an argument in the Federal Court in New Orleans —

THE COURT: Wednesday when?

MR. SOBOL: After lunch, about two o'clock?

THE COURT: I said ten-thirty, because that's the time Court starts.

MR. SOBOL: Could we make it at two?

THE COURT: Two o'clock would be fine. That's next Wednesday, February 1st.

MR. PEREZ: [113] If Your Honor please, this defendant is presently out on bond. Is that not correct? Is there a bond posted in this matter?

THE COURT: There is bond on him, yes, sir.

MR. PEREZ: Is it not so that he –

THE COURT: Not until sentencing, Mr. Perez.

MR. PEREZ: I see.

THE COURT: If I would have sentenced him and then delayed the execution of the sentence, then the bond would would then have to be posted, but not now. The bond is still in force and effect until the sentence is rendered.

Be back here next Wednesday at one or two o'clock.